STATE OF MICHIGAN

COURT OF APPEALS

RENA FARMER and WILLIAM FARMER,

Plaintiffs-Appellants,

v

PRACTICAL LIMITED DIVIDEND HOUSING ASSOCIATION, PARKVIEW TOWERS & SQUARE, and WALKER LAWN MAINTENANCE AND NORTHERN LANDSCAPE SUPPLY, INC.,

Defendants-Appellees.

UNPUBLISHED
July 21, 2009

No. 280627
Wayne Circuit Court
LC No. 06-607226-NO

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

WILDER, J., (*concurring in part and dissenting in part).*

I join in those aspects of the majority's opinion that affirms the trial court's grant of summary disposition in favor of defendant Walker Land Maintenance and Northern Landscape Supply (hereafter, Walker), and the trial court's grant of summary disposition as to William Farmer's loss of consortium claim in favor of all defendants. I respectfully dissent, however, from the majority's reversal of the trial court's grant of summary disposition in favor of defendants Practical Limited Dividend Housing Association and Parkview Towers & Square (hereafter, Practical/Parkview).

First, while the majority finds there is a question of fact as to whether "defendants Practical and Parkview breached their duty under MCL 554.139(1)(a) to maintain the [complex] *sidewalk* in a manner fit for its intended use, i.e., walking on it (emphasis added)," plaintiffs' counsel affirmatively stated, in response to a specific question by the trial court at oral argument on the summary disposition motion, that plaintiff did *not* slip on the sidewalks of the complex, but instead, slipped on the red cobblestone circular drive of the complex.[1] In addition, in her

[1] More elaborately, plaintiffs' counsel described the area where plaintiff fell as a cobblestone circular drive where people pull in to drop off or pick up passengers, similar to the kind of circular drive that one would find at a hospital or office building.

deposition testimony, plaintiff stated that she was on the cobblestone surface 20 steps from the door to the premises when she fell.

The location of plaintiff's fall is significant because, as noted by the Michigan Supreme Court in *Allison v AEW Capital Management, LLP*, 481 Mich 419, 430; 751 NW2d 8 (2008), a parking lot, which is constructed for the primary purpose of storing vehicles, is not rendered unfit for its intended use pursuant to MCL 554.139(1)(a) "simply because it was covered in snow and ice." As long as entrance to and exit from the parking lot is clear, the vehicles can access parking spaces, and tenants have reasonable access to their parked cars, the parking lot is considered fit for its intended purpose. *Allison*, *supra* at 429. In order to establish a violation of the landlord's duty to remove snow and ice from a parking lot, a plaintiff is required to show exigent circumstances, such as "when the accumulation is so substantial that tenant cannot park or access their vehicles in a parking lot." *Allison, supra* at 430, 438.

In the instant case, plaintiff fell 20 steps from the entrance of the premises on a common area surface that was clearly principally intended for vehicular use, not pedestrian use.[2] Plaintiffs have conceded that the documentary evidence shows that on January 5, 2005, between 6 am and 4 pm, Walker dispensed 5 tons of salt on the entire premises, including the circular drive area where plaintiff fell, to address the 6 inches of snow that allegedly fell that day. In addition, the undisputed documentary evidence further demonstrates that on the morning of January 6, 2005, Walker plowed and shoveled in the complex and Parkview employees began shoveling and salting in the complex beginning at 6 a.m. Plaintiff testified in her deposition that she plaintiff fell between 6 a.m. and 7 a.m., closer to 7 a.m., the very time that Practical/Parkview employees were in the process of continuing the shoveling and salting of the complex, and she further testified that there was no snow in the circular drive as she walked toward the parking lot. Finally, plaintiffs' counsel contended during oral argument on the summary disposition motion that plaintiff fell on black ice on the cobblestone surface. Thus, as in *Allison*, in this case, as a matter of law, Practical/Parkview met their duty under MCL 554.139(1)(a) because the cobblestone surface, though apparently somewhat icy, lacked the accumulation of snow and ice necessary to show exigent circumstances and was therefore fit for its intended purpose of vehicular use.

Even if the cobblestone vehicular surface is more similarly situated to a sidewalk than a driving or parking surface, nevertheless, in my judgment plaintiff still has failed to establish a claim under MCL 554.139(1)(a). In *Benton, supra* at 444, this Court held in part that "a landlord has a duty to take *reasonable* measures to ensure that the sidewalks are fit for their intended use" (Emphasis added). Whether a defendant has breached its duty to the plaintiff can, based on the evidence, be decided as a matter of law. See *Campbell v Kovich*, 273 Mich App 227, 231-232; 732 NW2d 116 (2007). Here, the undisputed facts and the entirety of the record establish that

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[2] Because plaintiff did not fall on a sidewalk, the majority's heavy reliance on *Benton v Dart Properties*, 270 Mich App 437; 715 NW 2d (2006), is misplaced.

Practical/Parkview hired contractors and used employees to salt and shovel all common area surfaces over a 10-hour period on January 5, and had resumed shoveling and salting on the morning of January 6 *before* plaintiff fell. Practical/Parkview's efforts to clear the six inches of snowfall of January 5 were so successful that plaintiffs contend plaintiff fell, not on a messy, slushy accumulation of snow and ice, but instead on a hazard, black ice, which was allegedly not even open and obvious. The requirement in MCL 554.139(1)(a) that landlords maintain common areas in a manner fit for their intended use does not impose on landlords the duty to insulate tenants from the realities of living in Michigan during the winter. I would conclude, therefore, as a matter of law that Practical/Parkview undertook reasonable remedial measures to maintain the common areas in a manner fit for their intended use.[3]

I would affirm the trial court's order granting summary disposition in its entirety.

/s/ Kurtis T. Wilder

[3] As noted by the majority, in granting summary disposition, the trial court ruled that defendants did not violate their common law duty to the plaintiff and "did not frame the issue in terms of defendants' statutory duty to maintain the common areas in a manner fit for their intended use…." In the trial court's defense, however, plaintiff's second amended complaint does not allege a statutory or contractual breach of duty by defendants Practical and Parkview. Plaintiffs sole claims against Practical and Parkview were for negligence (Count I) and nuisance (Count II). In this regard, while not specifically addressed by the majority, I would also find that the trial court properly concluded that, as to plaintiffs' negligence claims, the record evidence failed to establish a genuine issue of material fact that defendants breached their duty to exercise reasonable care to protect plaintiff from an unreasonable risk of harm caused by a dangerous condition in the complex. Plaintiff's nuisance claim does not appear to have been addressed by the trial court, however, it is questionable whether plaintiff's second amended complaint states a claim for either public or private nuisance.